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MITCHELL v. HELMS: DOES GOVERNMENT AID TO RELIGIOUS SCHOOLS VIOLATE THE FIRST AMENDMENT? AN EXTENSIVE ANALYSIS OF THE DECISION AND ITS REPERCUSSIONS

PETER A. SWIFT*

INTRODUCTION

The United States Constitution prohibits Congress from enacting legislation regarding the establishment of religion.¹ The Establishment Clause grows out of the First Amendment and not only prohibits the institution of an official church, but also bars the use of public funds for religious institutions.² The religion

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¹ See U.S. CONST. amend. I. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*; see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (setting a standard by which religion clauses were to be interpreted by holding that neither the state or federal government can set up a religion). *But see Reynolds v. United States*, 98 U.S. 145, 162-66 (1879). In *Reynolds*, Chief Justice Morrison R. Waite, writing for a unanimous court, declared that religious practices impairing the public interest did not fall under the protection of the First Amendment. Waite relied heavily upon history, and in particular Thomas Jefferson, observing that "a wall of separation between church and State" exists. *Id.* at 164.

² See U.S. CONST. amend. I; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373,

clauses of the First Amendment have been applied to the states via the Fourteenth Amendment.³ Courts, however, have recently held that federal and state aid can be distributed directly and indirectly to parochial schools.⁴ As a result, the federal government's power to provide aid to religious schools is now broader than in the past.⁵ In *Mitchell v. Helms*,⁶ the Supreme Court reaffirmed this judicial trend by maintaining that a statute that authorizes distribution of materials and equipment

394 (1985)) ("It is equally well settled . . . that the [s]tate may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the [s]tate.").

³ See U.S. CONST. amend. XIV; *Everson*, 330 U.S. at 8 (stating that the religion clauses of the First Amendment are applicable to the states by the Fourteenth Amendment).

⁴ See *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997) (holding that a state could fund a program that introduced public school teachers onto parochial school premises for the purpose of providing special education to underprivileged children); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (permitting a state, as part of a federal program for the disabled, to provide a sign-language interpreter to a deaf student at a Catholic high school); *Witters*, 474 U.S. at 482 (holding that the First Amendment does not bar a state from extending aid "under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director"); *Mueller v. Allen*, 463 U.S. 388, 400 (1983) (holding that a Minnesota statute that allowed state taxpayers to deduct expenses in providing tuition, textbooks, and transportation—including those incurred for children enrolled in parochial schools—did not violate the First Amendment); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) ("[Supreme Court] cases . . . have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend."); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (permitting, based on free speech principles, the University of Virginia to fund a student publication that promoted a particular religious belief).

⁵ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Court set forth a three-part criteria to evaluate whether government aid impermissibly advanced religion: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" (3) "the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (internal citations omitted). Governmental aid programs that failed any one of the three prongs were found to be contrary to the Establishment Clause because they had the impermissible effect of advancing religion. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (noting that the *Lemon* test required satisfaction of all three prongs); cf. *Mueller*, 463 U.S. at 394-404 (holding that a state tax program did not violate the Establishment Clause because it satisfied all three prongs required by the *Lemon* test).

⁶ 530 U.S. 793 (2000).

to religious institutions in Louisiana “ ‘cannot reasonably be viewed as an endorsement of religion.’ ”⁷

I. FACTS AND THE COURT’S DECISION

In *Mitchell*, a group of parents alleged that Chapter 2 of the Education Consolidation and Improvement Act of 1981, as applied in Jefferson Parish, Louisiana, violates the Establishment Clause of the First Amendment.⁸ Under this school aid program, Congress distributes funds providing for “the acquisition and use of instructional and educational materials, including library services and materials, . . . computer software and hardware for instructional use, and other curricular materials”⁹ These federal funds are sent via state educational agencies to public and private elementary and secondary schools.¹⁰ Services, materials, and equipment provided

⁷ *Id.* at 835 (plurality opinion) (quoting *Agostini*, 521 U.S. at 235). In *Mitchell*, the Court considered the constitutionality of a school aid program known as Chapter 2. Chief Judge Heebe of the District Court for the Eastern District of Louisiana had held that the assistance had the primary effect of advancing religion because the materials and equipment disbursed to the Catholic schools were direct aid to schools that were pervasively sectarian, and thus violated the second part of the *Lemon* test. He accordingly granted summary judgment in favor of the plaintiffs. *See id.* at 804. In 1994, having resolved the other issues in the case, Chief Judge Heebe issued an order permanently excluding pervasively sectarian schools in Jefferson Parish from receiving any type of aid under Chapter 2. *See id.*

Two years later, Chief Judge Heebe retired; Judge Livaudais received the case and reversed the decision of the former Chief Judge, citing change in this legal area over the past several years, specifically cases such as *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) and *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1469-70 (9th Cir. 1995). *See Mitchell*, 530 U.S. at 804-05. The United States Court of Appeals for the Fifth Circuit reversed Judge Livaudais’s ruling, holding Chapter 2 as unconstitutional. In reaching this decision, the Fifth Circuit focused on earlier Supreme Court decisions such as *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). *See Mitchell*, 530 U.S. at 806-07.

⁸ *See Mitchell*, 530 U.S. at 803-04; *see also* 20 U.S.C. § 7351(b)(2) (2000). Section 7351(b)(2) states that the assistance covers programs “which are tied to high academic standards and which will be used to improve student achievement and which are a part of an overall education reform program” *Id.* *See generally* 20 U.S.C. §§ 7301-7373 (2000) (defining the scope and implementation of the Chapter 2 aid program).

⁹ 20 U.S.C. § 7351(b)(2) (2000).

¹⁰ *See Mitchell*, 530 U.S. at 802. Congress allocated the basic responsibility for the administration of these funds “within the State educational agencies, but . . . [the primary] responsibility for the design and implementation of

to private schools must be "secular, neutral, and nonideological."¹¹ In an average year, about 30% of Chapter 2 funds spent in Jefferson Parish are allocated to private schools, most of which are Catholic or otherwise religiously affiliated.¹² The plaintiffs argued that these funds are easily divertible to religious use¹³ and that the statute has the primary effect of advancing religion.¹⁴

The Supreme Court upheld the statute, declaring that Chapter 2 was not a law regarding the establishment of religion.¹⁵ Justice Thomas, writing for a plurality, used the first two prongs of the test set forth in *Lemon v. Kurtzman*¹⁶ to explain the Court's rationale.¹⁷ Thomas maintained that the

programs . . . [is on] that of local educational agencies, school superintendents and principals, and classroom teachers and supporting personnel" 20 U.S.C. § 7301(c) (2000); see also 20 U.S.C. § 7312(a) (2000) (requiring that the allocation of funds by the state educational agency to local educational agencies be according to the relative enrollments within the school districts of the agency, but is also adjusted to provide higher allocations to local educational agencies that have a higher-than-average cost per child because of reasons such as enrollment by children from low-income families or children living in sparsely populated areas).

¹¹ 20 U.S.C. § 7372(a)(1) (2000).

¹² See *Mitchell*, 530 U.S. at 803; see also 20 U.S.C. § 7372(b) (2000) (stating that the expenditures for private school programs shall be equal, consistent with the number of children to be served, to expenditures for children enrolled in the public schools of the same local educational agency).

¹³ See *Mitchell*, 530 U.S. at 814-15; see also *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 660 (1980). In *Regan*, state reimbursements for testing services were clearly identifiable, and therefore were separable from religion. See *id.* The parochial schools did not control the test's content or its results. See *id.* at 656. Thus, the majority permitted state subsidies to private religious schools for particular secular programs such as testing and taking attendance. The Court, however, indicated that its decision would likely have been different if there were "no effective means for insuring that the cash reimbursements would cover only secular services." See *id.* at 659; see also *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) (rejecting as unconstitutional a tuition reimbursement program primarily because it was impossible to certify that the funds would not be used exclusively for "secular, neutral, and nonideological purposes").

¹⁴ See *Mitchell*, 530 U.S. at 815 n.7.

¹⁵ See *id.* at 829. In its holding, the Court declared that the two cases relied on by the Fifth Circuit in holding Chapter 2 unconstitutional, *Meek v. Pittenger*, 421 U.S. 329 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977), were no longer good law, calling them "anomalies in our case law." *Mitchell*, 530 U.S. at 808.

¹⁶ 403 U.S. 602 (1971).

¹⁷ See *Mitchell*, 530 U.S. at 807. In *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997), the Court modified the *Lemon* test "for purposes of evaluating aid to schools and examined only the first and second factors." *Mitchell*, 530 U.S. at

statute has a secular purpose, and does not have the primary effect of advancing religion.¹⁸ He specifically pointed out that the aid follows individuals, which means that the decision to support religious education is essentially made by the individuals involved, not by the State.¹⁹ Justice Thomas stated that when the aid to schools is readily available and first travels through the hands of private citizens who are free to direct the money elsewhere, then “the government has not provided any ‘support of religion.’”²⁰

The plurality opinion drew an analogy to *Zobrest v. Catalina Foothills School District*,²¹ reasoning that “a government computer or overhead projector does not itself inculcate a religious message”²² Moreover, Thomas maintained that the

807. There, the Court “recast *Lemon*’s entanglement inquiry as simply one criterion relevant to determining a statute’s effect.” *Id.* at 808. Thomas further reasoned that since the respondents in the instant matter did not dispute the District Court or Fifth Circuit ruling that the statute has a secular purpose, the Court would only consider the effect of Chapter 2.

The revised criteria for determining whether a statute has the effect of advancing religion involves three primary criteria: whether it “result[s] in governmental indoctrination, define[s] its recipients by reference to religion, or create[s] an excessive entanglement.” *Id.* (quoting *Agostini*, 521 U.S. at 234). But, since the respondents did not challenge the District Court holding that Chapter 2 does not create an excessive entanglement, the Court would only consider the first two criteria in determining the statute’s effect. *See id.*

¹⁸ *See id.* at 829-30. The respondents first argued that direct, nonincidental aid to religious schools always had the effect of being impermissible. Second, the plaintiffs argued that aid to the religious schools that is divertible to religious use is similarly impermissible. Justice Thomas dismissed these arguments as erroneous. *See id.* at 814-15, 829.

¹⁹ *See id.* at 830-31. Justice Thomas emphasized that the money that “ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” *Id.* at 811 (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487 (1986)).

²⁰ *Id.* at 816 (quoting *Witters*, 474 U.S. at 489).

²¹ 509 U.S. 1 (1993).

²² *Mitchell*, 530 U.S. at 823. Justice Thomas stated that the disposition in *Zobrest* would be the same if the interpreter for the blind was hired directly by the government, or if the government supplied the parents with the necessary funds to hire the interpreter to be used in the religious school. *See id.* at 819 n.8. Thomas presented a similar hypothetical situation of a government employer directly sending a portion of an employee’s paycheck to the employee’s designated religious institution, as opposed to the employee receiving the paycheck and then sending it to the institution. *See id.* Thomas used these examples to provide support for the Court’s holding that the Chapter 2 funds passed constitutional muster. According to Thomas, just as a government interpreter does not impart a religious message, the same is true for instructional materials such as maps and film projectors. *See id.* at 823.

schools serve as the bailees of the Chapter 2 aid, while the real beneficiaries are the students attending these religious schools.²³ The plurality came to the ultimate conclusion that the Chapter 2 funds cannot reasonably be viewed as an endorsement of religion and accordingly held that Jefferson Parish need not exclude religious schools from its Chapter 2 program.²⁴

In a concurring opinion, Justice O'Connor agreed with the plurality that the aid program was constitutional as applied in Jefferson Parish.²⁵ O'Connor articulated two reasons that compelled her to write separately.²⁶ First, she concluded that the plurality applied an inordinate amount of attention to neutrality, coming close to giving the concept "singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs."²⁷ Second, she maintained that the plurality's approval of government aid being diverted to religious indoctrination conflicted with the Supreme Court's precedents, and also was unnecessary to decide this case.²⁸

In a dissenting opinion, Justice Souter concluded that

²³ See *id.* at 831.

²⁴ See *id.* at 829.

²⁵ See *id.* at 837 (O'Connor, J., concurring). Justice O'Connor agreed with the plurality that *Meek v. Pittenger*, 421 U.S. 329 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), were inconsistent with the Court's judgment in the present case, and thus should be overruled. See *Mitchell*, 530 U.S. at 837. She also agreed with the plurality that *Agostini v. Felton*, 521 U.S. 203 (1997), was the controlling precedential authority and explained three similarities between *Agostini* and this case. See *Mitchell*, 530 U.S. at 837. First, like the Title I program in *Agostini*, Chapter 2 aid is distributed on the basis of a neutral, secular criteria, and is made available regardless of whether students attend public or private schools. Second, the Chapter 2 funds were made only to supplement the funds otherwise available to a religious school. Third, similar to the Title I program considered in *Agostini*, all Chapter 2 funds are controlled by public agencies and never actually make their way inside these religious schools. See *id.* at 848. Accordingly, she concurred in the judgment and joined in reversing the Fifth Circuit's decision. See *id.* at 837.

²⁶ See *Mitchell* at 837-38.

²⁷ *Id.* at 837. In her opinion, Justice O'Connor emphasized the importance of neutrality in analyzing Establishment Clause controversies, but she stated that it is not the only "axiom in the history and precedent of the Establishment Clause." *Id.* at 839 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995)).

²⁸ See *id.* at 837-38. Justice O'Connor strongly emphasized that the Establishment Clause does not permit the actual diversion of secular government aid to religious indoctrination. According to O'Connor, the Supreme Court's decisions "provide no precedent for the use of public funds to finance religious activities." *Id.* at 840 (quoting *Rosenberger*, 515 U.S. at 847).

religious teaching cannot be separated from secular education in religious schools, and thus, direct government subsidies to religious schools should be prohibited because they will “inevitably and impermissibly support religious indoctrination.”²⁹ He outlined three primary reasons to declare Chapter 2 aid unconstitutional.³⁰ First, compelling an individual to support religion is contrary to the principle of freedom of conscience.³¹ Second, he stated that this type of aid inevitably corrupts religion.³² Third, he averred that government establishment of religion is perpetually associated with conflict.³³

Following these premises, Justice Souter indicated that there were no safeguards in the Jefferson Parish program that obstructed the transfer of Chapter 2 property to religious purposes in the future.³⁴ State and local officials admitted that nothing prevents the Chapter 2 equipment from use in religious instruction,³⁵ and no device is employed to cease the likelihood

²⁹ *Id.* at 887 (Souter, J., dissenting); *see also* *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1995) (stating that a state cannot grant aid to a religious school where the effect is a direct subsidy to the school); *cf.* *NLRB v. Catholic Bishop*, 440 U.S. 490, 504-05 (1979) (distinguishing between the church-teacher relationship in a religious school from the employer-employee relationship in a public school).

³⁰ *See Mitchell*, 530 U.S. at 870-72.

³¹ *See id.* at 870. In his dissent, Justice Souter cited Thomas Jefferson and James Madison, who were instrumental in the enactment of the First Amendment, and their emphasis on the protection of governmental intrusion on religious liberty. He quoted Madison, who stated: “[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment.” *Id.* at 870-71 (internal citations omitted).

³² *See id.* at 871; *see also* *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (stating that the “first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion”).

³³ *See Mitchell*, 530 U.S. at 872; *see also* *County of Allegheny v. ACLU*, 492 U.S. 573, 578-79 (1989) (detailing the controversy surrounding placement of a crèche depicting the Christian Nativity scene and menorah near government buildings).

³⁴ *See Mitchell*, 530 U.S. at 902-03. Justice Souter maintained that little is known about the use of the aid due to the anemic enforcement system available. “The type of aid, the structure of the program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid.” *Id.* at 903. According to Souter, tape recorders, projection screens, maps, computers, and other instructional materials can easily be used for religious purposes by the religious teachers. *See id.*

³⁵ *See id.* at 907. Justice Souter pointed to evidence that the teachers in Jefferson Parish admitted that the Chapter 2 computers were joined with non-

that the equipment would be used for a religious purpose.³⁶ Souter concluded with statistics showing that these religious schools have a common objective—to engage in religious indoctrination—which gives rise to serious Establishment Clause concerns.³⁷

II. ANALYSIS OF THE CASE

In *Mitchell*, the Supreme Court ruled that the distribution of the Chapter 2 funds in Jefferson Parish did not violate the Establishment Clause of the First Amendment.³⁸ According to the Court, the allocation of funds was permissible because “it neither results in religious indoctrination by the government nor defines its recipients by reference to religion.”³⁹ While parochial schools received direct, nonincidental aid from the government, the Court strongly emphasized that the aid was secular.⁴⁰ This

Chapter 2 computers in religious schools and the Chapter 2 computers were used whenever there was a breakdown of the computing system. *See id.* at 910. One religious school actually admitted that the Chapter 2 aid was used to create a library. *See id.* at 910-11 n.28. This evidence shows that the Chapter 2 aid was not only supplementing their own budget in many areas, but that the school administrators used the aid to supplant their own funds. *See id.*

³⁶ *See id.* at 906-07. There was no effective system to monitor religious schools; local educational agencies at times had no idea “(a) what was purchased or (b) how it was utilized.” *Id.* at 906. Monitors visited sporadically and made only weak attempts at record keeping. Furthermore, many of the religious teachers were not informed of the restrictions involved. *See id.* There was not even “so much as an assurance that they would use Chapter 2 computers solely for secular purposes.” *Id.* at 907.

³⁷ *See id.* at 904-06 nn.21-25. Justice Souter cited the trial judge’s detailed record in his dissent. The record included evidence that most of the schools were Roman Catholic, the majority of them were pervasively sectarian, and their common mission and objective was to engage in religious education. Their teachers taught religiously. According to Souter, this creates the gravest concerns under the Establishment Clause. *See id.* at 904-06.

Furthermore, the trial judge found that the Roman Catholic schools in question operated directly under the Archbishop of New Orleans. *See id.* at 904 n.23. The mission of many of these schools was consistent with the published statements of the Archdiocese. *See id.* at 905 n.24. “The schools include religious symbols in their classrooms, require attendance at daily religion classes, conduct sacramental preparation classes during the schoolday, require attendance at mass, and provide extracurricular religious activities. At least some [schools] exercise a religious preference in accepting students and in charging tuition.” *Id.* at 904-05 n.23 (internal citations omitted).

³⁸ *Id.* at 829, 835 (plurality opinion).

³⁹ *Id.* at 808; *see also supra* note 17.

⁴⁰ *Id.* at 831-32. Additionally, while the plurality agreed with the dissent

Comment asserts that the statute granting aid to the parochial schools in Jefferson Parish violates the Establishment Clause and therefore should be declared invalid. In addition, it contends that the effect of this type of government aid program is the obstruction of the recipient religious institutions' ability to carry out their primary religious mission. This Comment will also consider the requirement of secular state authorities to monitor the religious schools' allocation of funds and implementation of their religious mission.

Following these themes, this Comment will first discuss how the aid to the religious schools in Jefferson Parish is easily divertible to religious use, making it a violation of the Establishment Clause.⁴¹ Divertibility is readily shown by the ineffectiveness of the government's monitoring program and by the failure of the religious schools to provide evidence regarding the utilization of the materials acquired.⁴² Second, the government aid fails the second prong of the *Lemon* test because the statute has the effect of advancing religion.⁴³ This is demonstrated through the "pervasively sectarian" nature of the religious schools involved, as well as the common objective and mission of these schools to engage in religious education.⁴⁴ Finally, this Comment will discuss how such government aid programs create an excessive entanglement between church and state, in violation of the third *Lemon* prong.⁴⁵

A. Divertibility of Government Aid

As a basic principle of the Establishment Clause, a statute

that there was evidence of actual diversion, it held that this evidence was not relevant to the constitutional inquiry. *See id.* at 833-34 ("The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.") On the other hand, Justice O'Connor argued that evidence of actual divertibility was *de minimis*. *See id.* at 864-65 (O'Connor, J., concurring).

⁴¹ *See id.* at 868-69 (Souter, J., dissenting).

⁴² *See id.* at 906-07.

⁴³ *See Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986) (stating that a direct subsidy to a religious school is impermissible under the second *Lemon* prong).

⁴⁴ *See Mitchell*, 530 U.S. at 904.

⁴⁵ In the context of evaluating aid to schools, the Court recast the third *Lemon* prong as one criterion relevant to determining the second *Lemon* prong (the statute's effect). *See Mitchell*, 530 U.S. at 807-08; *see also supra* note 17.

may not provide public aid for religion or provide assistance for the religious objective of any institution.⁴⁶ Any instructional materials distributed to church-related schools must be secular, nonideological, and neutral.⁴⁷ The aid must not be available for religious use and the religious instructors involved cannot attempt to reinforce and reflect the ideological view of the sectarian school upon the children.⁴⁸ In addition, direct aid to "pervasively sectarian" schools constitutes aid to the schools' efforts to proselytize religious values among its students.⁴⁹ Thus, financial aid to religious schools generates a primary effect that advances religion, in violation of the second prong of the *Lemon* test.

In the Louisiana program at issue in *Mitchell*, the majority of the private schools receiving aid are pervasively sectarian and the teachers instruct with an objective to engage in religious education.⁵⁰ Many of the religious schools display religious symbols in classrooms,⁵¹ require attendance at daily religious class,⁵² require attendance at mass,⁵³ and offer extracurricular religious activities.⁵⁴ Also, many of the Roman Catholic schools act under the authority of the Archdiocese of New Orleans,⁵⁵ which requires religious preferences for hiring teachers in

⁴⁶ See *Mitchell*, 530 U.S. at 867-68 (Souter, J., dissenting) (stating that the Establishment Clause "bars the use of public funds for religious aid").

⁴⁷ See *id.* at 880.

⁴⁸ See *id.* at 890.

⁴⁹ See *id.* at 887 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993)).

⁵⁰ See *id.* at 904-05; see also *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (disallowing the supplementation of the salary of teachers of secular subjects in nonpublic elementary schools). But see *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (holding that the release of public school students during school hours so that they may attend religious instruction off school grounds passed constitutional muster under the Establishment Clause).

⁵¹ See *Mitchell*, 530 U.S. at 904 n.23.

⁵² See *id.*

⁵³ See *id.* at 905 n.23.

⁵⁴ See *id.*

⁵⁵ See *id.* at 904 n.23. The mission and objectives outlined by the Roman Catholic schools in Jefferson Parish also support the conclusion that these institutions' primary objective is religious instruction. See *id.* at 905 n.24. Furthermore, according to the president of a sectarian high school, teachers are instructed that their answers be consistent with the teachings of the Catholic Church and "that they respond in that way to the students, so that there can be opportunities in other classes other than religion where discussion of religion could take place . . ." *Id.* at 906 n.25.

parochial schools.⁵⁶

As a result, the risk of immediate and future diversion of government aid to religious use becomes abundantly clear. Though the instructional materials and equipment provided by the Chapter 2 funds are specifically designated not for religious use but for secular purposes,⁵⁷ in actuality, the contrary may be true.⁵⁸ A teacher or a guidance counselor in a religious school might engage in unrestricted conversation with the student and at times fail to separate religious teaching from his secular responsibilities.⁵⁹ This kind of communication provides an unacceptable occasion for the intrusion of religious influence.⁶⁰ In order to properly monitor that the aid is used for secular purposes, and thus ensure that there are no constitutional violations, comprehensive and continuous surveillance is needed.⁶¹ This type of surveillance system is not present in the Jefferson Parish program.⁶²

Now, after the plurality's decision in *Mitchell*, if Congress wants to provide direct aid to religious schools, it could clearly do so.⁶³ A legislature merely needs to state a secular objective to legalize massive aid to any religious sect that they choose.⁶⁴ Such

⁵⁶ See *id.* at 905 n.25.

⁵⁷ See *id.* at 831 (plurality opinion).

⁵⁸ See *id.* at 907-08 (Souter, J., dissenting). In his dissenting opinion, Justice Souter maintained that although the applicable statute, 20 U.S.C. § 7372(c)(1), stipulates that materials are only being "lent" to nonpublic schools, there is actually "nothing in the Jefferson Parish program [that] stood in the way of giving the Chapter 2 property outright to the religious schools when it became older." *Id.*; see also *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (stating that aid "may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . .").

⁵⁹ See *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971) (recognizing that a religious person teaching at a school designed to impart religious doctrine would inevitably have difficulty remaining religiously neutral).

⁶⁰ See *id.* at 622-23 (finding that to allow public funds for religious teaching would promote political division along religious lines, "one of the principal evils against which the First Amendment was intended to protect").

⁶¹ See *id.* at 619 (stating that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected . . .").

⁶² See *Mitchell*, 530 U.S. at 906 (Souter, J., dissenting). Justice Souter pointed out that the plurality noted the apparent ineffectiveness of the government's monitoring program. There was no system in operation to determine what was purchased or how it was actually utilized. See *id.*

⁶³ See *id.* at 901 n.19.

⁶⁴ See *id.* Such an action is contrary to the principles of the Establishment

an effect violates the principle that, whatever the subject taught, "the [s]tate must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion...."⁶⁵ If religion is advanced in their teaching, extreme division along religious lines would result, which is one of the main depravities that the Establishment Clause was intended to protect against.⁶⁶

B. Primary Effect of Advancing Religion

As a matter of precedent, courts have held that any use of government funds to promote or advance religious doctrines violates the Establishment Clause.⁶⁷ In the past, this type of aid has been held as constitutionally impermissible because it has the primary effect of providing a direct and substantial advancement of sectarian education, a violation of the second *Lemon* prong.⁶⁸ It remains virtually impossible to separate secular education functions from sectarian. Thus, Chapter 2 government aid, in effect, supports the religious objective of

Clause. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (stating that "[n]o tax . . . can be levied to support any religious activities or institutions . . ."); F. King Alexander & Klinton W. Alexander, *The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the Ex Corde Ecclesiae for Catholic Colleges and Universities in the United States*, 29 J.L. & EDUC. 149, 166-67 (2000) (emphasizing that indirect and direct aid to private religious universities violates the Establishment Clause).

⁶⁵ *Lemon*, 403 U.S. at 619 (1971); see also Danielle Jess Latham, *Wall of Separation or Path to Interaction: The Uncertain Constitutional Future of School Vouchers in Light of Inconsistent Developments in Judicial Neutrality Between Church and State*, 48 DRAKE L. REV. 403, 420 (2000) (discussing how aid to religious schools in the form of vouchers is unconstitutional as violative of the Establishment Clause).

⁶⁶ See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973) (discussing the potential for divisiveness raised by state assistance to religious programs).

⁶⁷ See *Everson*, 330 U.S. at 16 (1947). In *Everson*, Justice Black cited James Madison in *Memorial and Remonstrance* to support his decision. Madison argued that:

[a] true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

Id. at 12.

⁶⁸ See *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986) (stating that it is "well settled" that a state may not directly subsidize a religious school).

religious schools in Jefferson Parish.⁶⁹ Furthermore, aid to religious schools that supplants their original expenditures creates nothing more than payment for replacing materials that had originally been purchased by the schools.⁷⁰

Church-related schools in Jefferson Parish have a religious mission and objective, and they intend to retain it.⁷¹ The education supplied in these religious schools is rooted in the instructors' individual and personal obligations, who then pass their religious values and beliefs on to the students in attendance.⁷² This process of indoctrinating religion is also "enhanced by the impressionable age of the pupils, in primary schools particularly."⁷³ Therefore, because religious teaching cannot be separated from secular education in religious schools, government aid to sectarian schools only has the effect of inevitably and impermissibly advancing religion.

Although the Court fervently believes that the materials distributed would be used for purely secular objectives, there remains a substantial risk that teachers will take the opportunity, "unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."⁷⁴ This result of indoctrination develops despite an assumption of good faith on the part of the teachers to perform within the restrictions imposed by the First Amendment.⁷⁵

⁶⁹ In *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), Justice O'Connor described the harm of government endorsement of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*

⁷⁰ See *Mitchell v. Helms*, 530 U.S. 793, 896 (2000) (Souter, J., dissenting); see also, e.g., *Cochran v. La. Bd. of Educ.*, 281 U.S. 370, 374-75 (1930) (upholding a state severance tax devoted to supplying school children with school books). The Court reasoned that the program was constitutional because sectarian schools are not relieved of any obligations.

⁷¹ See *Mitchell*, 530 U.S. at 904-06.

⁷² See *Lemon v. Kurtzman*, 403 U.S. 602, 615-18 (1971) (declaring that the religious nature of church-related schools inevitably poses a danger of impermissible church-state relationships).

⁷³ *Id.* at 616; see also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 749 (1976) (plurality opinion) (stating that the impressionable age of elementary and secondary school students is a relevant inquiry).

⁷⁴ *Mitchell*, 530 U.S. at 894 (quoting *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973)).

⁷⁵ See *Lemon*, 403 U.S. at 618 (noting that a "dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its

In *Everson v. Board of Education*,⁷⁶ the Supreme Court held that no tax could be levied to support any religious activities or institutions.⁷⁷ Nevertheless, the Court held that the statute in issue was constitutional because reimbursing parents of parochial school students for bus transportation does not handicap or favor religion.⁷⁸ The Court feared that if the statute was declared invalid, parents would be reluctant to enroll their children in religious schools, making it more difficult for the schools to operate.⁷⁹ This would contradict the important neutrality objective behind the addition of the Establishment Clause to the Constitution.⁸⁰

Unlike the bus program in *Everson*, there has been no attempt on the part of government officials in *Mitchell* to guarantee that the government aid would not be used in support of the religious functions.⁸¹ The assistance provided in *Mitchell* consists of materials such as film projectors, tape recorders, maps, and computers.⁸² These instructional aids, as distinguished from the financial grants to parents in *Everson*, could easily be used by religious instructors for religious purposes.⁸³ Without the grants, religious schools would have to pay for the educational services with privately raised funds.⁸⁴

tenets, will inevitably experience great difficulty in remaining religiously neutral”).

⁷⁶ 330 U.S. 1 (1947).

⁷⁷ See *id.* at 15-16.

⁷⁸ See *id.* at 17.

⁷⁹ See *id.* at 17-18.

⁸⁰ See R. Craig Wood & Michael C. Petko, *Assessing Agostini v. Felton in Light of Lemon v. Kurtzman: The Coming of Age in the Debate Between Religious Affiliated Schools and State Aid*, 2000 BYU EDUC. & L.J. 1, 2-4 (2000) (reviewing the Supreme Court's evaluation of the neutrality involved in such state-sponsored activities as supplementing private school teachers' salaries and reimbursing private school funds for textbooks when these expenses are incurred for secular purposes).

⁸¹ See *Mitchell v. Helms*, 530 U.S. 793, 906-07 (2000) (Souter, J., dissenting) (criticizing the ineffectiveness of the government's monitoring program). In *Everson*, the government provided neither financial nor any other form of support to the parochial schools themselves. The program merely helped parents get their children, regardless of their religion, to school safely. See *Everson*, 330 U.S. at 18.

⁸² See *Mitchell*, 530 U.S. at 903.

⁸³ See *id.*

⁸⁴ See *Walz v. Tax Comm'n*, 397 U.S. 664, 671-72 (1970) (stating that “making textbooks available to pupils in parochial schools . . . was surely an ‘aid’ to the sponsoring churches because it relieved these churches of an enormous aggregate cost for those books”).

With the grants, more private funds are available for religious education.⁸⁵ Thus, because these grants free funds that otherwise would be used to pay for state-mandated services, their primary effect is to advance religion.⁸⁶ Hence, the Chapter 2 funds in Louisiana are in violation of the second prong of the *Lemon* test, and should be declared unconstitutional.

III. EXCESSIVE GOVERNMENT ENTANGLEMENT

While aid from the government should not be given to private schools, the trend in the United States seems to be going in that direction.⁸⁷ Under the leadership of President George W. Bush, the opportunities for government aid to “faith-based” organizations are multiplying.⁸⁸ The conservative Supreme Court that decided *Mitchell* has proven itself sympathetic to the idea of government assistance to parochial schools.⁸⁹ Although this trend appears unstoppable, it results in nothing more than an unacceptable entanglement of the state in the affairs of the church, in violation of the Establishment Clause.

As shown in *Mitchell*, many religious schools are eager to receive government funds. A looming danger to consider in this debate is the interference of the government in the mission of these schools. With increasing and easier access to public money has come greater public scrutiny.⁹⁰ Concern is rising among

⁸⁵ See *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (acknowledging, but not accepting, the theory that that aid to private schools for secular expenses frees those schools to use their resources for a religious purpose).

⁸⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding that a statute’s “principal or primary effect must be one that neither advances nor inhibits religion”).

⁸⁷ See, e.g., Phil Roach, *Reader Responses*, THE ATLANTA J. & CONST., Feb. 20, 2001, at 10A (urging the Department of Education to underwrite full tuition vouchers for all children in a school district); see also *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (“[C]ustodial oversight of the student-initiated religious group . . . does not impermissibly entangle government [with religion]....”).

⁸⁸ See, e.g., Marc Lacey with Laurie Goodstein, *Bush Fleshes Out Details of Proposal to Expand Aid to Religious Organizations*, N.Y. TIMES, Jan. 31, 2001, at A15 (reporting President Bush’s announcement of new federal grants to support certain religious organizations).

⁸⁹ See *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality opinion).

⁹⁰ See, e.g., *Jackson v. Benson*, 578 N.W.2d 602, 608 (Wis. 1998) (noting the significant level of supervisory and reporting tasks required of a state agent to monitor progress of students attending private schools by virtue of public funding).

parochial educators that the potential for vast government regulation may be imminent if public money is accepted.⁹¹

In *Jackson v. Benson*,⁹² the Supreme Court of Wisconsin ruled that a state-funded voucher program does not violate the separation of church and state.⁹³ The program at issue allows poor children in Milwaukee to attend the public or private school of their choice, including religious schools.⁹⁴ The Wisconsin Supreme Court's decision was based on the view that the qualifying parents should determine which schools receive their voucher dollars.⁹⁵ In this way, the court was satisfied that the government would not be able to turn private schools into public schools in violation of the Establishment Clause.⁹⁶ Subsequently, the United States Supreme Court denied certiorari of the case,⁹⁷ spawning voucher efforts in several states.

Despite the support of the Wisconsin Supreme Court, the Wisconsin voucher effort could presage widespread government meddling in private education.⁹⁸ In order to participate in the voucher program, religious schools had to concede to a number of federal and state regulations.⁹⁹ Most strikingly, participating schools may not show religious preference in their voucher admissions, and voucher students cannot be required to participate in any religious activity, including religious education classes.¹⁰⁰ This raises questions for schools with religious missions. Nearly all of Milwaukee's Catholic schools are

⁹¹ See Ray Quintanilla & Noreen Ahmed-Ullah, *Bush Offers School Plan; Archdiocese Likes It But City Doesn't*, CHI. TRIB., Jan. 24, 2001, at 1 ("[P]rivate schools . . . worry that vouchers may come with rigid government regulations.").

⁹² 578 N.W.2d 602 (Wis. 1998).

⁹³ See *id.* at 607.

⁹⁴ See *id.* at 607-08.

⁹⁵ See *id.* at 626.

⁹⁶ See *id.*

⁹⁷ See *Jackson v. Benson*, 525 U.S. 997, 997 (1998).

⁹⁸ See Joe Loconte, *Schools Learn That Vouchers Can Have a Hidden Cost*, WALL. ST. J., Jan. 26, 1999, at A18 ("[T]he victory in Wisconsin [upholding the constitutionality of the voucher program] also serves as a reminder that, given the chance, choice opponents will turn voucher programs into a Trojan horse for government meddling in private and religious schools."); see also Joe Loconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, 93 POL'Y REV. 30-36 (1999) (evaluating the potential adverse impact of vouchers on the mission of religious schools).

⁹⁹ See Loconte, *Schools Learn That Vouchers Can Have a Hidden Cost*, *supra* note 98, at A18.

¹⁰⁰ See *id.*

participating in the voucher program, yet many Protestant denominations and Jewish schools have refused to be included in this plan.¹⁰¹

Although no Milwaukee or Louisiana Catholic student has “opted out” of religious education,¹⁰² odds are that in the near future, students will feel pressured to conform to a religion other than their own. When that occurs, civil liberties groups will likely be ready with a lawsuit to attempt regulation of the religious schools. In schools where religion is closely entwined with all aspects of the curriculum, as in many evangelical Protestant Schools, it may become impossible for the religious and secular elements of the schools to be separated.¹⁰³

Already, more conservative religious groups have decided not to participate in voucher programs in Wisconsin because they are afraid of the slippery slope of government intrusion.¹⁰⁴ Civil liberties groups have asserted that if taxpayer dollars are spent on religious schools, then government oversight must be applied.¹⁰⁵ The courts have rejected the latter view so far, but if hypothetical public statements and real life lawsuits continue, it may prove to be disastrous for the religious schools. Parochial schools would be wise to exercise caution over the amount of their involvement with the government. The U.S. Constitution was designed to keep church and state separate. If the entanglement continues in this new decade, it could possibly destroy the special moral and educational tenor of religious schools.

CONCLUSION

The Chapter 2 government aid program in Jefferson Parish, Louisiana is directly contrary to the First Amendment’s Establishment Clause. The type of aid, the structure of the

¹⁰¹ See Loconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, *supra* note 98, at 30-36.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*; see also Marc D. Stern, *School Vouchers—The Church-State Debate That Really Isn’t*, 31 CONN. L. REV. 977, 983 (1999) (stating that much of the support for vouchers comes from “libertarian think tanks,” not from religious groups).

¹⁰⁵ See Loconte, *Schools Learn That Vouchers Can Have a Hidden Cost*, *supra* note 98, at A18.

program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid. Moreover, little is known about use of the aid due to the lax enforcement currently in place. This reveals that actual diversion actually has occurred. The Jefferson Parish aid program also has the primary effect of advancing religion due to the "pervasively sectarian" nature of the religious schools involved, and thus violates the second prong of the *Lemon* test. Finally, this type of aid package has the potential damaging effect of government entanglement between church and state that may harm the parochial schools that take part in the program. The Establishment Clause was created to prohibit Congress and the states from making any law respecting an establishment of religion. With the decision holding the Chapter 2 statute constitutional, the *Mitchell* Court misinterpreted the First Amendment and undermined the constitutional rights of American citizens.